Two Worlds Collide: Salary Arbitration for NHL Players in the Salary Cap Era

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I. INTRODUCTION

In the summer of 1997, Tommy Salo was a young and promising goaltender who had just finished his first full season as the New York Islanders' starting goalie.[1] However, after an emotional arbitration hearing during which Islanders' General Manager Mike Milbury called Salo "one of the worst-conditioned athletes on the team,"[2] the goalie who had helped lead the 1994 Swedish national team to Olympic gold was reduced to tears.[3]

Salary arbitration can be a nasty process with both players and teams fighting for every dollar.[4] Although salary arbitration hearings can sometimes damage players' egos, the players themselves fought to implement the system in 1970 and fought to maintain it in 1994.[5] Despite the

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[1] Tim Wharnsby, *The Most Bitter of Battles*, THE SPORTING NEWS, July 22, 2002, *available at* http://findarticles.com/p/articles/mi_m1208/is_29_226/ai_95680434/. The article also discusses John LeClair's adversarial arbitration hearing with the Philadelphia Flyers in 2000. *Id.* LeClair had averaged forty-seven goals per season the previous five seasons and had a total of 235 goals during those seasons, the most in the NHL for that time period. *Id.* Despite this output, Flyers General Manager Bobby Clarke told the arbitrator that LeClair was weak defensively and a disappointment in the playoffs. *Id.*

[2] *Id.*

[3] *Id.*; Johnette Howard, *Sweden Wins on Forsberg's Shot in Shootout*, WASH. POST, Feb. 28, 1994, at C1.

[4] James Mirtle, *Gloves Come Off During Arbitration*, THE GLOBE AND MAIL, July 28, 2008, *available at* http://www.theglobeandmail.com/sports/gloves-come-off-during-arbitration/article701005/.

[5] Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 193, 194 (2003). The NHL was the first professional sports league to implement a salary arbitration system. *Id.* at 193. In 1994, with an eye toward curbing steadily increasing player salaries that resulted from the free agency and salary arbitration systems, systems the owners saw as inflationary, the commissioner reopened the CBA and sought to eliminate salary arbitration altogether by implementing a luxury tax on team payrolls. CBC Sports, *We've Been Here Before*, http://www.cbc.ca/sports/indepth/cba/features/flashback.html (last visited Aug 16, 2011). The players would not agree to the owners' demands, in particular the abolition of salary arbitration and a luxury tax; as a result the owners locked the players out at the beginning of the 1994–1995 season. *Id.* Half the season was washed away amid the labor dispute, which saw the players return to action in January of 1995 after conceding certain

players' best efforts to maintain their footing, the time-honored tradition of salary arbitration in the National Hockey League (NHL) may have met its eventual demise[6] with the ratification of the NHL's newest Collective Bargaining Agreement (CBA) in 2005, which implemented a salary cap for the first time in league history.[7] One labor lawyer called the new CBA "the largest setback for players that I've seen in collective bargaining."[8] The 2005 CBA was the result of a season-long lockout during the 2004–2005 campaign. The lockout greatly reduced NHL fan support at a time when popularity was slipping. In addition, the league jeopardized a television contract with NBC that was scheduled to begin that season.[9]

The implementation of a salary cap is nothing new in professional sports as both the NBA and NFL utilize this type of system.[10] This note will examine the viability of salary arbitration in a league that also utilizes a salary cap and will demonstrate the potential shortcomings and victories for both the players and the owners.

This analysis is important because the NHL's current CBA is essentially an experiment that could determine which system, salary arbitration or salary cap, is most effective in regard to resolving player-owner contract disputes.

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provisions of the free agency and salary arbitration structures. *Id.* The players were able to ward off the implementation of the luxury tax. *Id.*

[6] Stephen M. Yoost, Note, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 532 (2006). Yoost predicted that salary arbitration would eventually become non-existent because with the implementation of a salary cap, the arbitrator would be limited as to the contract he or she could award. *Id.* He contended that the lack of a cap on the possible award facilitated the attractiveness of the system. *Id.*

[7] Rick Westhead, *N.H.L. Players Overwhelmingly Approve Labor Deal*, N.Y. TIMES, July 22, 2005, at D1.

[8] *Id.* Under the new CBA, which was ratified in July of 2005, during the 2005–2006 season teams could spend between $21 million and $39 million on player salaries. *Id.* The players had rejected a deal with a $42.5 million salary cap in February of 2005. *Id.* Furthermore, under the new CBA, players receive 54% of the league's revenue, a severe decrease from the 75% the players were receiving before the introduction of the salary cap. *Id.*

[9] *Lockout Over Salary Cap Shuts Down NHL*, Associated Press, Feb. 16, 2005, *available at* http://sports.espn.go.com/nhl/news/story?id=1992793. Amid the "he said, she said" nature of the negotiations, Mario Lemieux, one of the league's most decorated players and currently the owner of the Pittsburgh Penguins, stated, "A few years ago, I thought the owners were making a lot of money and were hiding some under the table, but then I got on this side and saw the losses this league was accumulating." *Id.*

[10] Aubut, *supra* note 5, at 190. Aubut notes that these salary cap systems "foster[] sharing between the league and the players, and resemble[] more of a partnership between the two sides than an actual employer-employee relationship." *Id.* at 236.

Any effects that a salary cap has on salary arbitration could impact the way other leagues restructure their CBAs once the current one expires.[11] Furthermore, under the pre-2005 CBA, the NHL was losing money at an alarming rate with salary arbitration contributing strongly to its deficit.[12]

Part II of this note discusses the history of salary arbitration in the NHL and outlines the current NHL salary arbitration structure. Next, Part III compares the NHL's new system with the NFL's system, which is widely considered the most effective salary system in professional sports,[13] and discusses triumphs and shortcomings of the salary cap system. Part IV examines the effect that the NHL's salary cap has had on its salary arbitration system and the major differences between these two systems. Finally, Part V discusses the implications that the salary cap will have on salary arbitration, concluding that salary arbitration will remain viable, though not have as prominent a role as it did during the pre-salary cap era.

II. THE EVOLUTION OF THE NATIONAL HOCKEY LEAGUE'S SALARY STRUCTURE

A. *Hockey's Reserve Clause*

Prior to the implementation of salary arbitration, NHL player contracts contained a reserve clause.[14] A reserve clause bound a player for his entire

[11] With many cities fielding teams in multiple sports and even sharing the same stadiums, the major professional sports teams feed off of one another. THE SPORTS STAFF OF USA TODAY, THE COMPLETE FOUR SPORT STADIUM GUIDE: EVERYTHING YOU EVER WANTED TO KNOW ABOUT ALL OF THE MAJOR LEAGUE BASEBALL AND FOOTBALL STADIUMS AND HOCKEY AND BASKETBALL ARENAS (Balliet & Fitzgerald, Inc. ed., 2d ed. 1996).

[12] Arthur Levitt Jr., *Independent Review of the Combined Financial Results of the National Hockey League 2002-2003 Season*, http://www.nhl.com/nhlhq/cba/archive/levitt/levittreport.pdf (last visited Aug. 16, 2011). According to the owners, salary arbitration is inflationary. *See We've Been Here Before*, *supra* note 5.

[13] In the 2009–2010 season, the NFL's total gross revenue was $7.8 billion, nearly $5 billion more than NHL's total revenue for the same year. Plunkett Research, Ltd., Sports Recreation Leisure Market Research–Statistics, http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx (last visited Aug. 16, 2011).

[14] Joshua M. Liebman, *Tip Your "Cap" to the Players: 2007–2008 Off-Season Reveals NHL's Salary Cap Benefits on Players*, 16 SPORTS LAW. J. 81, 83 (2009). Other professional sports leagues used reserve systems prior to their current salary structures. Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 268, 275. Major League Baseball's (MLB) reserve system was created in 1879 at first as a

career to the team with which he first signed a contract.[15] Upon the contract's expiration, the team retained the sole rights to the player and, as a result, had all the leverage in salary negotiations.[16]

The NHL reserve clause system began to unravel in 1972 under the pressure of player-initiated litigation.[17] In *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, Gerry Cheevers, a star player for the Boston Bruins, signed a deal with the Cleveland Crusaders of the World Hockey Association (WHA), a rival professional hockey league, at the expiration of his contract with the Bruins.[18] The Bruins sought an injunction against Cheevers claiming that the reserve clause in his contract gave the team sole possession of his rights.[19] The district court determined that the reserve clause was likely a violation of the Sherman Antitrust Act; however, it ruled in favor of Cheevers on the ground that Boston Professional Hockey Association (BPHA) had not proven that the loss of Cheevers would produce irreparable harm to the financial state of the organization, and therefore failed to meet the requirements for an injunction.[20]

"gentlemen's agreement" between owners, under which owners would provide each other with a list of five players whom all other owners agreed not to sign. *Id.* at 268. This system was so successful that by owners put reserve clauses in every player contract by the late 1880s. *Id.* The clause gave the owners the option to continue renewing the player's contract at a salary of the owner's choosing. *Id.* The player was essentially left with two options: play for his current team or quit professional baseball. *Id.* The National Basketball Association (NBA) utilized a similar system. *Id.* at 275.

[15] Liebman, *supra* note 14, at 84.

[16] *Id.*

[17] *Id.* at 83–84.

[18] Boston Prof'l Hockey Ass'n, Inc. v. Cheevers, 348 F. Supp. 261, 263–64 (D. Mass. 1972). A mere two weeks after *Cheevers*, the United States District Court of Minnesota, Fourth Division, faced a nearly identical case in *Nassau Sports v. Hampson*. Liebman, *supra* note 14, at 85. In *Hampson*, Ted Hampson had signed a one year contract with the Minnesota North Stars, but was traded to the New York Islanders midway through the season. Nassau Sports v. Hampson, 355 F. Supp. 733, 734 (D. Minn. 1972). At the conclusion of the season, which ended his one-year contract, Hampson signed a contract with the Midwest Saints of the WHA. *Id.* Nassau Sports sought an injunction to prevent Hampson from signing with the Saints on the grounds of the reserve clause in Hampson's contract. *Id.* at 735.

[19] *Cheevers*, 348 F. Supp. at 263–65.

[20] *Id.* at 265–69. The court in *Nassau Sports v. Hampson* ruled similarly to the court in *Cheevers*, also noting that the reserve clause probably violated the Sherman Antitrust Act, but refused to decide the issue on those grounds. 355 F. Supp. at 736–37. The court in *Cheevers* noted that the United States Supreme Court had previously held that Major League Baseball was the only professional sport whose reserve clause system was exempt from federal antitrust laws. *Cheevers*, 348 F. Supp. at 265 (citing Flood v. Kuhn, 407 U.S. 258 (1972)). The court in *Cheevers* also pointed out that the extension of

Litigation regarding the restraints of the reserve clause continued with *Nassau Sports v. Peters*, in which Gary Peters sought to leave the New York Islanders for the Metropolitan Hockey Club of the WHA.[21] Unlike the court in *Cheevers*, the district court in *Peters* determined that Nassau Sports had met the requirements for an injunction; however, the court held that Peters did not have to sign a contract with the Islanders for the upcoming season if it contained another renewal option.[22] Essentially, the decision in *Peters* upheld the reserve clause, but limited the team's option to just one year, rather than allowing it to continue perpetually.[23] In response to *Peters*, NHL owners adopted a one year team option standard player contract, which freed players up to move to WHA teams.[24]

The back and forth litigation concerning the ramifications of the reserve clause culminated in 1979 with *McCourt v. California Sports, Inc.* Dale McCourt was drafted by the Detroit Red Wings in the 1977 NHL amateur draft and signed a three year contract with the team.[25] After McCourt's rookie season, Detroit signed Rogatien Vachon, previously of the Los Angeles Kings, to a five year contract.[26] Based on the new compensatory system employed by the NHL, an arbitrator awarded McCourt's rights to Los Angeles as compensation for Detroit's signing of Vachon.[27] Instead of reporting to the Kings, McCourt filed suit.[28] In overturning the injunction issued by the trial court, which prevented McCourt's rights from being transferred to Los Angeles, the Sixth Circuit Court of Appeals held that the NHL's reserve system was not subject to antitrust liability on the grounds that it was incorporated into the NHL's CBA as a result of a good faith,

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antitrust exemptions to professional baseball was a historical anomaly and predicted that one day the Supreme Court would eradicate this error and extend federal antitrust laws to all professional sports operating interstate. *Cheevers*, 348 F. Supp. at 265.

21 Nassau Sports v. Peters, 352 F. Supp. 870, 873 (E.D.N.Y. 1972). Peters had signed a one year contract with the Boston Bruins in 1971, but the Islanders, a newly acquired NHL franchise, received the rights to Peters under the NHL's expansion draft system whereby new franchises gain the rights to twenty-one players from the teams in the league. *Id.* at 874.

22 *Id.* at 881–82.

23 Liebman, *supra* note 14, at 87.

24 *Id.* Despite this victory for the players, player movement between NHL franchises was still very limited due to new rules that compensated a player's former team with money, draft picks, or current players from the team with which the player signed. *Id.*

25 McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1195–96 (6th Cir. 1979).

26 *Id.* at 96.

27 *Id.*

28 *Id.*

arms-length negotiation.[29]

The restraints on free agency and player salaries upheld by the court in *McCourt* remained a detriment to NHL player contracts until the early 1990s when the National Hockey League Player's Association (NHLPA) went on strike and won a reduction of the age at which a player could become eligible for free agency without compensation.[30] The events of the 1970s regarding the NHL's reserve clause system shaped the adversarial nature of salary disputes between teams and players today because players no longer feel that owners have an aggressive upper hand when it comes to contract negotiations.[31]

B. *Salary Arbitration in the NHL Under the Scope of the Old CBA*

Leading up to the cancellation of the 2004–2005 season due to lockout, the league was on a crash course for disaster. A lot of the problem, from an owner's point of view, was the sharp increase in player salaries that came along with the increased disclosure requirements regarding player salaries.[32]

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[29] *Id.* at 1203. To reach its holding, the court analyzed the reserve system under the Mackey Standard, set forth in *Mackey v. National Football League*. *Id.* at 1197–98. In *Mackey*, John Mackey challenged the NFL's free agency and salary structure, specifically the Rozelle Rule, which required a team signing a veteran free agent to compensate the team who lost the player. Mackey v. Nat'l Football League, 543 F.2d 606, 609 (8th Cir. 1976). In holding that the Rozelle Rule violated antitrust laws, the court set out a three part test to determine when a reserve clause system is exempt from antitrust laws: (1) "The restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "The agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "The agreement sought to be exempted is the product of bona fide arm's-length bargaining." *Id.* at 614.

[30] Liebman, *supra* note 14, at 88. The age that a player became eligible for free agency without compensation dropped from 31 to 30. *Id.* Furthermore, free agents who were 25 and younger or between 26 and 29 were awarded a decrease in the draft-choice compensation owed to their former team upon signing with another team. *Id.* at 88–89.

[31] Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL ... An Agent's View*, 4 MARQ. SPORTS L.J. 1, 1 (1993). In 1989, the players agreed to salary disclosure. *Id.* Bartlett points out that salary disclosure leveled the playing field to some extent because after years of making educated guesses and relying on incomplete salary data, agents finally had access to the actual salary figures for players across the league. *Id.* Armed with this information, agents finally had a feel for their client's value in relation to other similarly situated players. *Id.* This led to what Bartlett refers to as a "market correction" because inequities in salary between similarly valued players was readily apparent. *Id.*

[32] In 1992, a turning point for player salary demands in the NHL, the owners claimed that player salaries amounted to $363 million and that teams only earned $400 million in revenues. *We've Been Here Before*, *supra* note 5. Despite this clearly

The 1992 player strike and the 1994 lockout in 1994 resulted in a salary arbitration system that remained in place until the salary cap was implemented in 2005.[33] The NHL and MLB are the two major professional sports leagues that use salary arbitration to resolve contract disputes.[34] However, the NHL has two unique features that must be kept in mind when evaluating the system: the "walk away" provision and the flexible offer arbitration system. While these two features will be referred to in the context of the current CBA, they were also a part of the CBA preceding the 2005 agreement.

1. *The NHL's "Walk Away" Provision*

Perhaps the most unsettling proposition found in the NHL salary arbitration system is the "walk away" provision in Article 12, section 12.10 of the current CBA.[35] Under this provision, if a team elects to take a player to arbitration and the award issued is more than $1,042,173 per year, the owner may inform the player and the league that it does not intend to tender a contract for that amount.[36] If the owner takes the player to arbitration for a

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problematic structure, players still felt that the owners were holding back on their salaries and one of the factors that led them to believe this was their perception that NHLPA President Alan Eagleson had "too cozy" of a relationship with the owners. Bartlett, *supra* note 31, at 1. In response, the players elected to fire Eagleson in 1991 before the negotiations for a new CBA, which was set to expire that year. *Id.* The players turned to Bob Goodenow, who injected an adversarial attitude into the negotiations. *Id.* Under Goodenow's leadership, the players went on strike for the first time in league history in 1992. *Id.* The players' adversarial mentality, however, led to salary disclosure being placed into the new CBA, and this feature has aided players in salary arbitration hearings ever since. *Id.*

[33] Aubut, *supra* note 5, at 196.

[34] *Id.* at 190.

[35] National Hockey League, National Hockey League Players' Association Collective Bargaining Agreement, (July 22, 2005), art. 12, § 12.10 [hereinafter NHL CBA]. Under MLB's salary arbitration system the arbitrator's decision is final and both the team and the player must abide by it. *See* Yoost, *supra* note 6, at 517.

[36] NHL CBA, *supra* note 35, art. 12, § 12.10(a). The $1,042,173 figure increases each year in an amount equal to any increase in the average league salary at the end of the previous year. *Id.* During the most recent arbitration period, Nikolai Zherdev, a forward for the New York Rangers, was one of twenty players who filed for arbitration and one of only three whose filing reached the hearing stage. NHL.com Staff, *Twenty Players File for Salary Arbitration*, July 6, 2009, http://bruins.nhl.com/club/news.htm?id=449781; *see also* Jamie Fitzpatrick, *Salary Arbitration: NHL Family Court*, Aug. 4, 2009, http://proicehockey.about.com/b/2009/08/04/salary-arbitration-nhl-family-court.htm. Zherdev was awarded a one year contract worth $3.9 million; however, the Rangers declined the contract, exercising their "walk-away" right. *Twenty Players File for Salary*

one year contract and subsequently elects to walk away from the arbitration award, the player automatically becomes an unrestricted free agent and may deal with any team he wishes.[37] If the owner takes the player to arbitration for a two year contract and subsequently elects to walk away from the arbitration award, the player and club will enter into a one year player contract and the player will automatically become an unrestricted free agent at the conclusion of the contract.[38]

2. *The NHL's Flexible Offer Arbitration System*

Perhaps the biggest difference between NHL salary arbitration and MLB arbitration is the fact that arbitrators in the NHL system may place the player's determined value at any number they see fit.[39] The arbitrator must provide a brief summary of the reasons behind his or her decision, along with a brief statement of the evidence relied upon in forming a decision.[40]

MLB utilizes a form of arbitration called the "final-offer" system.[41] Under this system, the arbitrator's decision is restricted to the figures submitted by both parties.[42] The arbitrator must choose either the player's figure or the team's figure, they cannot select an amount in between the two figures, or choose an amount they consider more appropriate.[43] Furthermore, unlike NHL arbitrators, MLB arbitrators cannot reveal the bases for their decisions.[44] In light of "final-offer" arbitration, perhaps one drawback to the NHL system, where arbitrators are not constrained to choosing either the player's or the team's figure, is that parties are less likely to submit reasonable offers. As a result, the parties will often submit unreasonable offers because the arbitrator will be inclined to choose a figure close to the

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Arbitration, *supra* note 36. Incidents such as the Zherdev arbitration illustrate how even if a player is awarded a high salary in arbitration, his team, due to salary cap considerations, may still walk away.

[37] NHL CBA, *supra* note 35, at art. 12, § 12.10(a).

[38] *Id.* at art 12, §12.10(b). A club may only exercise its "walk away" power one time in a year where it has one or two salary arbitration awards; two times in a year where it has three or four salary arbitration awards; three times in a year where it has five or six salary arbitration awards, and so on. *Id.* at art 12, § 12.10(c).

[39] NHL CBA, *supra* note 35, at art 12, § 12.9(n)(ii)(d).

[40] *Id.*

[41] *See* ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 82 (1992).

[42] ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 146–147 (2000).

[43] Aubut, *supra* note 5, at 211.

[44] *Id.*

middle of the two offers. In other words, there is no incentive in the system for parties to submit reasonable offers.[45]

3. *Structure and Implications of the Salary Arbitration System Under the Old CBA*

NHL salary arbitration has been a crucial negotiating point in every CBA negotiation since its inception in 1970, and the players and owners have renewed it in every collective bargaining agreement since that time.[46] Except for two important provisions, which will be discussed later in this section, the 2005 CBA the CBA immediately preceding it are identical, and as a result, provisions cited will be from the 2005 CBA.[47]

Salary arbitration in the NHL only applies to restricted free agents—players whose rights still belong to their current team but who could not come to an agreement on a contract extension with their current team.[48] As mentioned above, owners retain a limited "walk-away" right under which they have the ability not to tender a contract in the amount determined by the arbitrator if certain conditions are present.[49] Arbitration hearings take place during the first two weeks of August, a full two months before the opening of the NHL regular season.[50]

Pursuant to the previous CBA, only players could elect to initiate salary arbitration.[51] Once the player decided to utilize salary arbitration, the team chose whether the term of the contract awarded at arbitration would be for one or two years.[52] If a team failed to specify the term, one year was the default term.[53] The players and the NHLPA jointly presented their case, and

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[45] *Id.* at 224.

[46] Yoost, *supra* note 6, at 512.

[47] *Id.* at 521.

[48] NHL CBA, *supra* note 35, at art. 10, § 10.2(a). Restricted Free Agents are classified as "Group 2" Free Agents. *Id.*

[49] *Id.* at art. 12, § 12.10.

[50] *Id.*

[51] Yoost, *supra* note 6, at 513.

[52] *Id.*

[53] *Id.* Yoost suggested that the default term strongly favored the players because in the event a team forgot to specify the term of the deal, the players would only be locked into a one year deal and would earn unrestricted free agency status sooner. *Id.* Conversely, if the default term would have been two years, opting for arbitration would automatically lock a player into his current club for two more years and limit his immediate prospect of negotiating for a higher salary with other teams. *Id.*

the team and the NHL jointly presented their case.[54]

A critical piece of evidence in every arbitration hearing is the "Comparable Exhibit."[55] Both the League and the NHLPA are required to create exhibits that set forth salary terms of the contracts for all players that each side intends to use as a comparable player.[56] The importance of the Comparable Exhibit is reflected by the fact that the CBA specifically directs the arbitrator to list any comparables relied upon in their decision.[57]

Other evidence that is admissible besides comparable player compensation includes: the overall performance of the player in the previous season[s]; a player's injuries or illnesses in the previous season; the player's length of service in the League or for the team; the overall contribution of the player to the competitive success of the team; and qualities of leadership or public appeal.[58] Inadmissible evidence includes: any contract of the player that began before he became a restricted free agent; any contract of a player who is not being presented as a comparable player; history of negotiations between the player and the team; press materials; any reference to the team's "walk away" rights; any award issued by a salary arbitrator where the team walked away from the award; the financial condition of the team or the League;[59] references to the team's upper or lower limits, or the player's share; and any reference to a salary arbitration award that was issued prior to the 2005 CBA.[60]

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[54] NHL CBA, *supra* note 35, at art. 12, § 12.9(d).

[55] *Id.* at art. 12, § 12.9(g)(v).

[56] *Id.* Using an analysis of comparable players is the preferred method of both the team and the player for supporting their submitted figures. Aubut, *supra* note 5, at 225. Yoost argued that the "heavy reliance" on comparable players' salaries before the implementation of the 2005 CBA resulted a league-wide increase in player salaries. Yoost, *supra* note 6, at 514. Whenever a player negotiated a new contract with a higher salary, comparable players' values also increased. *Id.* Therefore, the key to a successful arbitration hearing on the part of the player is to prove that he is comparable to another player with a higher salary. *Id.*

[57] NHL CBA, *supra* note 35, at art. 12, § 12.9(n)(ii)(D).

[58] *Id.* at art. 12, § 12.9(g)(ii).

[59] Aubut struggles with the implications of the inadmissibility of this type of evidence. In the context of the pre-2005 CBA years, she asserts that failing to take a team's financial state into account is advantageous for the players because their salaries increase at the market rate even if the team opposing them in arbitration is not doing well financially. Aubut, *supra* note 5, at 226. Along these lines, the NHL arbitration system failed to account for the fact that some teams were in, or on the verge of, financial turmoil and that large arbitration awards could be their demise. *Id.* In this vein, the pre-2005 arbitration system accounted for player well-being no matter what team they played for. *Id.*

[60] NHL CBA, *supra* note 35, at art. 12, § 12.9(g)(iii).

4. *Distinctions Between the Old and New Salary Arbitration System*

As mentioned above, there are two major differences between the pre-2005 salary arbitration system and the current system. The first of these differences is that players are eligible for salary arbitration after four years in the league rather than three.[61] The other change in the new system is that for the first time in the history of NHL salary arbitration, teams may take players to salary arbitration.[62] The team may take any player to arbitration who earns more than $1,500,000 in the final year of his most recent contract if the player has not accepted the team's qualifying offer[63] or initiated player-elected arbitration.[64] Both of these innovations to the salary arbitration system appear to equalize the playing ground between owners and players.[65] Especially in light of the team-initiated arbitration amendment, owners are now better able to control the salaries of players.[66] This ability is further

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61 *Id.* at art. 12, §12.1(a). Under this provision, players who signed their first contract between the ages of 18 and 20 must have four years of professional experience before they are eligible for arbitration. *Id.* Yoost suggested that this change would favor the owners because it gives teams and their players an extra year to come to an amicable agreement on the player's next contract. It also gives teams an extra year to determine if they even want to pursue the player beyond his current contract. Yoost, supra note 6, at 521. As a result, the occurrences of salary arbitration will decrease. *Id.*

62 NHL CBA, *supra* note 35, at art. 12, § 12.3(b)(ii). Under the team-initiated arbitration structure, a player may only be subjected to team-initiated arbitration once in his career. *Id.* at art. 12, §12.3(c). This right attaches to the player even if the initiation of arbitration by the team does not lead to a hearing. *Id.* Furthermore, teams may only utilize team-initiated arbitration twice per league year. *Id.* at art. 12, § 12.3(d).

63 A qualifying offer is the offer that a restricted free agent's current team makes to him in lieu of him being offered a contract by another team. Under the 2005 CBA's qualifying offer system, players earning $660,000 or less are entitled to a qualifying offer at a rate of 110% of his previous year's salary. NHL CBA, Collective Bargaining Agreement FAQs, http://www.nhl.com/ice/page.htm?id=26366 (last visited Aug. 16, 2011). Players earning between $660,000 and $1 million are entitled to qualifying offers at a rate of 105% of their previous year's salary. *Id.* Players earning more than $1 million are entitled to qualifying offers at a rate of 100% of their previous year's salary. *Id.* Yoost contends that these qualifying offer rates will increase player salaries at modest rates and as a result keep players from looking to arbitration for an increase in salary. Yoost, *supra* note 6, at 521.

64 NHL CBA, *supra* note 35, at art. 12, § 12.3(b)(i).

65 Yoost, *supra* note 6, at 522.

66 *Id.* If a team feels that a player is underperforming, but still wishes to keep the player, the team can initiate arbitration and present evidence to the effect that the player

reflected in the next section, which analyzes the new salary cap structure in the NHL.

III. THE MECHANICS AND IMPACT OF THE NHL'S SALARY CAP SYSTEM

On July 13, 2005, the NHL's labor disaster ended and a salary cap was officially implemented as part of the League's CBA.[67] There are two types of salary caps in professional sports: a hard salary cap and a soft salary cap.[68] Out of the three professional sports leagues that now utilize a salary cap structure (the NBA, NFL, and NHL), both the NHL and NFL operate under a hard salary cap.[69] A hard salary cap prohibits teams from exceeding a designated upper limit in payroll and from dropping below a designated lower limit.[70] The main purpose behind the NHL's adoption of a salary cap was to tie the players' salaries to the success or failure of the League.[71]

A. *The NFL's Salary Cap System*

Before determining the role of salary arbitration in the NHL's salary cap era, it is important to understand the salary cap system and its underlying policies. Perhaps the best way to gauge the efficacy of the league's system is to compare it to the NFL's already-established hard salary cap system.[72]

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is not worth the high salary he is demanding. *Id.*

[67] *Back on the Ice*, CBC SPORTS ONLINE, July 22, 2005, http://www.cbc.ca/sports/indepth/cba/. The lockout leading to the new agreement lasted over 300 days and forced the entire 2004–2005 season to be cancelled. *Id.*

[68] *See* Aubut, *supra* note 5, at 216.

[69] *Id.*; *see also* Liebman, *supra* note 14, at 94.

[70] Liebman, *supra* note 14, at 94. Under the NBA's soft salary cap system, a team is permitted to exceed the upper limit of its payroll in order to sign their own free agents. Aubut, *supra* note 5, at 220. However, if a team does exceed this limit, they are penalized in the form of a luxury tax, which the team must pay to the league. *Id.* A team operating within a hard salary cap system must plan its payroll in advance and manage its player contracts carefully in order to ensure that its payroll meets the cap requirements and that it does not have to cut or trade players in order to bring its payroll number within the cap's limits. *Id.* at 218.

[71] Liebman, *supra* note 14, at 93. Supporters of the salary cap also praised the new system because they believed it would provide a way for cash-strapped teams in nontraditional markets to compete with the financially solvent teams that had previously been outspending them by great margins. Tarik El-Bashir, *In Years After NHL Lockout, Fight Over Finances Lives On*, WASH. POST, Oct. 3, 2007, at E1.

[72] The NFL is the most financially successful professional sports league in America. In 2008-2009, the NFL had an operating income of just over $1 billion compared to MLB's operating income of $522 million, the NBA's operating income of $233 million

The NFL salary cap sets a guaranteed league-wide salary, a salary cap, and a minimum team salary each season.[73] In any year in which a salary cap is in effect, players are collectively entitled to a league-wide salary in the amount of 50% of total league revenues.[74] Furthermore, under the guaranteed league-wide salary system, if player costs for all NFL teams during a salary-capped year are below 50% of total league revenues, the league will pay an amount equal to the deficiency to all players who played in the league that year.[75]

The amount of the salary cap on each team's permissible player expenditures is determined based on an equation that varies each season.[76] For example, for the 2010 league year, the salary cap was equal to 58% of projected total league revenues, minus league-wide projected benefits, divided by the total amount of teams playing in the league.[77] The amount of the team salary minimum began at 84% of the salary cap in 2006, and has increased by 1.2% each year since.[78] A team may spend as much as it wants over the minimum as long as total player salaries do not exceed the salary cap.[79] If a team fails to exceed the salary minimum by the end of a league year, the team must pay the shortfall to any players who were on the team's roster at any point during that year, pursuant to the NFL Players Association allocation instruction.[80] Team salary includes player contracts,[81] tenders,[82]

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and the NHL's operating income of $184 million. *Sports Industry Overview*, *supra* note 13.

[73] National Football League Collective Bargaining Agreement, (Mar. 8, 2006), art. XXIV, § 2(a) [hereinafter NFL CBA]. These features are contingent upon player costs for all NFL teams equaling or exceeding 56.074% each year. *Id.* If the player costs for all NFL teams drops below 46.868% in any given year, then there shall be no salary cap for the following year and any other proceeding year until the teams' player expenditures reach the level defined in section 2(a). *Id.* § 2(b).

[74] *Id.* § 3.

[75] *Id.* This feature of the NFL CBA illustrates the attractiveness of a salary cap system. Under such a system, the owners and the players are partners in the enterprise of the league for all intents and purposes. No matter what teams decided to spend on player salaries, the players are entitled to 50% of total league revenues. *Id.*

[76] *Id.* § 4(a). In the final year of the current NFL CBA, there will be no salary cap. *Id.*

[77] *Id.* "Projected Benefits" are the aggregate of all sums paid during a league year by the NFL and its teams to, or on behalf of, current and former NFL players. *Id.* § 1(b). These benefits include pension funding, group insurance, and travel expenses. See *Id.*

[78] NFL CBA, *supra* note 73, at art. XXIV, § 5(a). The team salary minimum cannot exceed 90% of the salary cap and each team's salary must exceed the minimum at the end of each year. *Id.*

[79] *Id.* § 5(b).

[80] *Id.* § 5(c). If a team fails to make a payment after the league has determined that

practice squad contracts, termination pay, and grievances.[83]

Another important feature of the NFL salary cap system is the ability of the players, the league, or any team to bring an action alleging a violation of the rules governing the guaranteed league-wide salary, the salary cap, or the minimum team salary before a "Special Master."[84] For example, if a player believes his team did not spend enough to reach the team salary minimum, he may file a grievance with the Special Master, who then has the ability to make a determination as to whether or not the team owes its players more money.[85]

B. *The Intricacies of the NHL Salary Cap System*

1. *Why a Salary Cap?*

The preamble of the Article within the NHL CBA that governs the league's salary cap system states, "This Article 50 creates a fixed relationship between League-wide Player Compensation and Hockey Related Revenues,[86] and provides that League-wide Player Compensation will rise or

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its team salary for the given year fell short of the minimum, the NFL will make the payment to the players on behalf of the team. *Id.* § 5(d).

[81] Player contracts include players' signing bonuses; however, the bonuses are prorated over the life of the contract up to a maximum of six years. *Id.* § 7(b)(i). Incentive bonuses, such as a quarterback receiving a certain amount for throwing a certain number of touchdowns, are included in player contracts to the extent that "they are likely to be earned" during the league year. *Id.* § 7(c)(i).

[82] Tenders include the minimum salary for rookies, a minimum active list salary for players whose contracts have expired, and the qualifying offer for restricted agents. *Id.* § 6(b).

[83] *Id.* § 6(c)–(e).

[84] The Special Master is appointed by a court and only has jurisdiction to hear disputes related to specific portions of the CBA, including the provisions governing the salary cap. NFL CBA, *supra* note 73, at art. XXVI, § 1. The Special Master's decisions are reviewable by the courts. *Id.*

[85] *Id.* § 5(d).

[86] "Hockey Related Revenue" is comprised of the following items: NHL Regular Season and Playoff Gate Receipts, Pre-season Gate Receipts, Gate Receipts from "Special Games" (i.e. the All Star Game), National and International Digital Broadcasts, Revenue generated from NHL Networks, Local Cable Television Broadcasts, Local Pay-Per-View, Satellite and other Broadcasts, Local Radio Broadcasts, Club Internet Websites, Publications, In-arena Novelty Sales, Non-arena Novelty Sales, Concessions, Luxury Box and Suite Sales, Club and Premium Seat Sales, Arena Sponsorships, Sign Advertising and Parking. NHL CBA, *supra* note 35, at art. 50, § 50.1(a). The league made sure to classify this list as non-exhaustive in case other revenue streams are

fall in direct proportion to a rise or fall in Hockey Related Revenues."[87] The preamble also explains that the new system is not meant to prohibit flexible spending amongst the teams, only to set an upper and lower limit for player salary expenditures.[88]

2. *How the Upper and Lower Limits of the Salary Cap are Calculated*

Each year the "Applicable Percentage" will be calculated to determine the players' share of Hockey Related Revenues.[89] The dollar amount of the players' share will equal Applicable Percentage of Hockey Related Revenues.[90] Furthermore, the agreement specifically asserts that any dispute regarding the Applicable Percentage will be resolved so that league-wide player compensation will always equal the players' share of Hockey Related Revenues for that year.[91]

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established in the future. *Id.*

[87] *Id.* As Yoost pointed out, despite the NHL's decline in popularity throughout the 1990s, players' salaries continued to increase at a steady, if not staggering, rate. Yoost, *supra* note 6, at 495. In 2004, a year before the current CBA was negotiated, the average player salary was $1.8 million, over three times the average salary just ten years before. *Id.* Therefore, it appears that the owners wanted to make clear in the preamble of their salary cap system that the players would no longer prosper while the league spiraled into turmoil.

[88] NHL CBA, *supra* note 35, at art. 50, pmbl.

[89] *Id.* at art. 50, § 50.4(b).

[90] *Id.* For the first season under the CBA, 2005–2006, the players' share equaled 54% of Hockey Related Revenues. *Id.* For any year after the 2005–2006 season, the Applicable Percentage will be calculated as follows: Any League year during which revenues are below $2.2 billion, the players' share will remain at 54% of Hockey Related Revenues; Any League year during which revenues are equal to or exceed $2.2 billion, but do not exceed $2.4 billion, the players' share will be between 55% and 56% of Hockey Related Revenues; Any League year during which revenues are equal to or $2.4 billion, but do not exceed $2.7 billion, the players' share will be between 56% and 57% of Hockey Related Revenues; Any League year during which revenues exceed $2.7 billion, the players' share will be 57% of Hockey Related Revenues. *Id.* For example, if Hockey Related Revenues equaled $2.3 billion, then the players' share would be equal to 55% of $2.3 billion.

[91] NHL CBA, *supra* note 35, at art. 50, § 50.4(c)(i). This portion of the CBA applies, "Notwithstanding any agreement, circumstance, contract, argument of fact or law, or ruling in any arbitration, litigation, or other proceeding, and notwithstanding anything in this Agreement that may indicate to the contrary. . . ." *Id.* No matter how much interested observers felt the players lost overall in the current CBA, this provision indicates that the players were able to make sure that their rights could not be arbitrated or litigated away after the fact.

Much like the NFL's salary cap system, the NHL system sets an upper and lower limit for team spending on player salaries.[92] These limits are based on a team's "Averaged Club Salary."[93] A team's Averaged Club Salary may not fall below the lower limit or rise above the upper limit.[94] Any team with an Averaged Club Salary below the upper limit has payroll room in the amount of the difference between the upper limit and the Averaged Club Salary.[95] The range between the upper and lower limit is known as the "Payroll Range."[96]

Because the upper and lower limits of the Payroll Range are directly related to Hockey Related Revenues, the limits can rise or fall based on the success of the league in maintaining and growing Hockey Related Revenues.[97] Despite the strictness of the salary cap system, the CBA permits some flexibility in the Averaged Club Salary for teams to plan their roster by allowing the upper limit to be temporarily increased by 10% during the period from July 1 until the last day of training camp.[98]

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[92] *Id.* § 50.5.

[93] *Id.* "Averaged Club Salary" means the aggregate amount committed by each club in a league year as player salaries and bonuses. *Id.* § 50.5(d)(i). This calculation is made daily and does not include benefits. *Id.*

[94] *Id.* § 50.5(a). As with the NFL CBA, bonuses based on a player's future performance are not counted toward a team's Averaged Club Salary except in certain situations. *See Id.* § 50.5(h); *see also Id.* § 50.10(d) (allowing for an exception to the upper limit based on long-term injury or illness of a player).

[95] NHL CBA, *supra* note 35, at art. 50, § 50.5(a). If a team has payroll room, it may use that room to contract for or acquire additional player salaries or bonuses to the extent of their payroll room. *Id.*

[96] *Id.* § 50.5(b). The upper and lower limits of the Payroll Range are calculated by the following formula: Preliminary Hockey Related Revenues for the prior league year, multiplied by the Applicable Percentage (players' share of Hockey Related Revenues), minus Preliminary Benefits, divided by the number of teams currently in the league. This number equals the midpoint of the Payroll Range. The midpoint of the Payroll Range will then be adjusted upward by a factor of 5% (revenue growth factor) in each league year. This number equals the adjusted midpoint. The Payroll Range is then established by adding $8 million to the adjusted midpoint to determine the upper limit and by subtracting $8 million from the adjusted midpoint to determine the lower limit. *Id.*-The imposition of upper and lower limits is perhaps the best indicator of the league's seriousness in regards to placing restraints on players' salaries. Yoost, *supra* note 6, at 523. A year after the introduction of the salary cap system, Yoost predicted that the cap would help create parity amongst the teams in the league. *Id.*

[97] *Id.* § 50.5(b).

[98] *Id.* § 50.5(c)(ii)(B). The switch to a salary cap in 2005 forced teams to make major adjustments in their management of player salaries. Helene Elliott, *Trying to Get a Cap to Fit*, L.A. TIMES, July 20, 2005, at D1. With the implementation of the new system, many teams scrambled to hire experts known as capologists to help them manage payroll

To understand how aggressively the NHL salary cap system will impact players' salaries, consider that during the 2002–03 year, two years before the season-long lockout, the NHL spent 75% of Hockey Related Revenues on player salaries.[99] Furthermore, consider that the NHL has not spent 57% of Hockey Related Revenues on player salaries since 1994.[100] Clearly the CBA's breakdown of the players' share benefits the league over the players because the threshold of $2.2 billion in revenue is quite unrealistic. During the league's last year of operation before the lockout it failed to turn a profit.[101]

3. *Revenue Sharing Amongst Teams*

Another feature under the Collective Bargaining Agreement that could have an impact on the effects of salary arbitration is the Player Cost Redistribution System. The purpose of this new provision is to force large-market, high-revenue teams to share some of their revenues with small-market, low-revenue teams so that these teams can spend more on player compensation.[102]

At the end of each season, the league will prepare a master list ranking all the teams in descending order.[103] The team at the top of the list will be the team with the highest preseason and regular season gross revenues for the year just concluded.[104] The team at the bottom of the list will be the team

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and make cap appropriate personnel decisions. *Id.* Brian Burke, then the general manager of the Anaheim Mighty Ducks, studied how NFL teams dealt with the salary cap in order to prepare for the new system. *Id.* According to Burke, the role of a cap expert was quite significant within NFL organizations; however, it did not alter the chain of command in terms of who made the ultimate decision regarding player movement and acquisitions. *Id.* Burke asserted, "[t]here's the talent side and the economic and financial people, side by side. The football people still make the decisions." *Id.*

[99] Yoost, *supra* note 6, at 522–23.

[100] *Id.* at 523. The players' revenue share under the salary cap system represents a significant step back in terms of their overall share of the revenues before the salary cap system was implemented. *Id.* As Yoost observed, this feature of the new CBA illustrated the NHL's effort to curb player costs, which spiraled out of control during the pre-salary cap era. *Id.*

[101] *Id.*

[102] NHL CBA, *supra* note 35, at art. 49, pmbl. The redistribution system recognizes that certain low-revenue teams may have trouble spending much more than the Lower Limit of the payroll range. *Id.* The stated goal of the system is that all teams be able to reach a level of financial competition with one another. *Id.*

[103] *Id.* § 49.3(a).

[104] *Id.*

with the lowest gross revenues for the year just concluded.[105]

IV. THE SALARY CAP'S IMPACT ON SALARY ARBITRATION

A. *Using the Salary Cap to Avoid Salary Arbitration*

One lesson that teams learned from the pre-salary cap era of inflated player salaries is that salary arbitration controls the free agent market.[106] Peter Botterill, the Pittsburgh Penguins' salary cap expert, recognized this trend when he joined the team in 2007. He immediately implemented a strategy to offset the negative effects that salary arbitration can have on a team's payroll.[107]

Many teams in the league have adopted Botterill's strategy and have begun signing their top players to long-term contracts.[108] Since the new CBA, teams have been signing their franchise players to long-term deals,

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[105] *Id.* A team will be ineligible to receive Player Compensation Cost Redistribution for a particular year if any of the following conditions are met. The team is on the top half of the master list. The team's games were broadcast in more than 2.5 million households for the previous season. The team's available player compensation exceeds the targeted team player compensation for the upcoming season. *Id.* at § 49.3(b).

[106] Rob Rossi, *Pens' Cap Expert Botterill Has Challenging Job*, PITTSBURGH TRIBUNE REVIEW, Sept. 23, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/s_528973.html. Botterill's assessment regarding the influence that salary arbitration has had over the free agent market led him to adopt a strategy of signing younger players to long-term deals before they reached restricted free agency, at which point their salary arbitration rights attached. *Id.*

[107] *Id.* "Look, if a player has the opportunity to go to (salary arbitration), you have to take it seriously and abide by it," explained Botterill. *Id.* "Every contract we do right now has an impact down the road." *Id.* Botterill's strategy is exemplified in the case of two players that the Penguins signed before the 2007 season. *Id.* Ryan Whitney, a valuable puck-moving defenseman who was going to be eligible for restricted free agency at the end of the season and whom Botterill predicted would be a strong candidate for salary arbitration, was signed to a six year, $24 million extension, only a $4 million dollar per year cap hit. Rossi, *supra* note 106. Sidney Crosby, perhaps the biggest star in the NHL today, was signed to a five year, $43.5 million dollar extension, a cap hit of $8.7 million per year. *Id.* Although a combined cap hit of $12.7 million for two players may seem high, because the cap was projected to go up at the time, the signings could turn out to be a bargain. *Id.* The Crosby and Whitney signings also reflect a trend among teams: Locking up younger players with long-term contracts before the players become eligible for salary arbitration. *Id.*

[108] Liebman, *supra* note 14, at 103–04. As Liebman notes, signing players to long-term contracts allows teams to avoid the risk of losing their top players to free agency and the risk that the player will go to salary arbitration and win a contract that is beyond the team's means. *Id.*

with an average annual salary that is manageable against the salary cap.[109] Although these long-term deals afford teams certainty because the player is more likely to stay with the franchise—and remain ineligible for free agency and salary arbitration rights—such deals force teams to be absolutely certain about their commitment to the player and the player's commitment to remaining a top producer.[110]

B. *Taking Advantage of the Salary Cap to Sign Restricted Free Agents*

Because teams cannot exceed the upper limit of the salary cap, teams must plan years down the road in terms of personnel decisions in order to avoid losing players to other teams with more room under the salary cap.[111] Before the new CBA came into effect, teams would often match offer sheets

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[109] *Id.* at 103–05. In 2006, the New York Islanders signed their then twenty-five year old goaltender Rick DiPietro to a fifteen-year, $67.5 million deal that equals a yearly cap hit of only $4.5 million. ESPN.com, *DiPietro's Record 15-Year Deal Will Pay Him $67.5M*, Sept. 13, 2006, http://sports.espn.go.com/nhl/news/story?id=2584306. In 2007, the Philadelphia Flyers signed their star forward Mike Richards to a twelve year extension worth $69 million, a cap hit of only $5.75 million per year. *Flyers Sign Leading-Scorer Richards to 12-Year Extension*, Associated Press, Dec. 13, 2007, *available at* http://sports.espn.go.com/nhl/news/story?id=3153967. Most recently, the Washington Capitals signed one of the best players in the league, forward Alex Ovechkin, to a thirteen year extension worth $124 million, an annual cap hit of $9.5 million. *Ovechkin, Capitals Signs 13-Year, $124 Million Contract Extension*, Associated Press, Jan. 13, 2008, *available at* http://sports.espn.go.com/nhl/news/story?id=3190712.

[110] Liebman, *supra* note 14, at 103–05. Prior to the salary-cap era, teams could maneuver around a bad contract by buying out or trading the contract, or by agreeing to pay a portion of that player's salary in order to free up cash. *Id.* However, a miscalculation in the salary-cap era regarding a player's value can leave a team's salary cap situation in shambles due to the fact that a contract buyout still counts against the cap. *Id.* In response to the restrictions that the new CBA has placed on buyouts of unwanted contracts, teams have begun to front-load long-term player contracts. *Id.* at 105. Front-loading a deal allows a team to structure the contract so that the majority of the player's total salary over the course of the contract will be paid in the earlier years, making a possible trade or buyout in later years more affordable for the team. *Id.* For example, in 2007, the Philadelphia Flyers signed winger Daniel Briere to an eight year contract worth $52 million. ESPN.com, *Briere Agrees to Eight-Year Deal With Philadelphia*, July 2, 2007, http://sports.espn.go.com/nhl/news/story?id=2922605. This deal works out to $6.5 million per year. *Id.* However, Philadelphia structured the deal so that Briere's pay slid downward over the course of his contract, ending with Briere earning only $2 million in the final year of the deal. *Id.* This structure gave Philadelphia a lot of flexibility to unload the contract if the need arose in the latter years of the deal. Liebman, *supra* note 14, at 106.

[111] Liebman, *supra* note 14, at 106.

offered to their restricted free agents by other teams because there was not any restriction on the amount of money a team could commit to player salaries.[112] However, under the current system, teams must manage their payroll responsibly and make tough decisions regarding which players to keep for the long term and which players to expose to free agency.[113]

Although teams can use the offer sheet system to pry restricted free agents away from teams who are up against the salary cap, general managers of low-revenue teams can use the offer sheet system to go after restricted free agents in order to exceed the cap floor.[114] Use of the offer sheet could become a more popular way for a general manager to add player salaries because of the hype that goes with signing an impact free agent from another team.[115]

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[112] *Id.*

[113] *Id.* During the 2007 off-season, the Edmonton Oilers attempted to take full advantage of other teams' loose management of the salary cap. *Sabres Draw the Line, Match Oilers' Offer Sheet for Vanek*, Associated Press, July 6, 2007, *available at* http://sports.espn.go.com/nhl/news/story?id=2927805. Edmonton cleverly attempted to use the offer sheet provision in the CBA to lure Thomas Vanek, who was earning only $942,000 in the final year of his rookie contract, with a seven year, $50 million contract. *Id.* If Edmonton had been successful, it would have owed Buffalo a first round pick as compensation. *Id.* Sabres general manager, Darcy Regier, felt that the offer by Edmonton was a cheap shot despite its legality. *Id.* Regier stated that one of the reasons Buffalo matched Edmonton's offer was "to say to everyone in the National Hockey League, '[i]f you want to shop this way, don't come here.'" *Id.* That same year, the Oilers offered Anaheim Ducks restricted free agent Dustin Penner, who had just finished his first full year in the league, a five year contract worth $21.5 million. *Ducks Decline to Match Five-Year, $21.25 M Offer Sheet*, Associated Press, Aug. 3, 2007, *available at* http://sports.espn.go.com/nhl/news/story?id=2958805. Anaheim, which only had $5 million in cap space, declined to match Edmonton's offer on the grounds that the salary was highly inflationary considering that Penner had only played one full year in the NHL. *Id.* Anaheim general manager at the time, Brian Burke, was infuriated by the Oilers' offer, asserting, "If I believe these salaries don't make sense and I match then I'm just as dumb as the team that extended the offer." *Id.* Anaheim was awarded a first, second, and third round draft pick as compensation for Penner's departure. Scott Burnside, *Lowe's Offer Sheet Tactic Could Soon Become the Norm*, Aug. 13, 2007, http://sports.espn.go.com/nhl/columns/story?_columnist=burnside_scott&id=2958884.

[114] Burnside, *supra* note 113. As Scott Burnside observed, use of the offer sheet could become a growing trend among NHL teams despite the pre-salary cap notion that use of the offer sheet was a dirty move. *Id.*

[115] *Id.* As use of the offer sheet increases, it will force general managers to lock up their younger assets with long-term contracts in order to avoid a team like Edmonton inducing a free agent to switch teams. *Id.* As Burnside points out, the use of the offer sheet is, in a way, a secondary draft where teams can pick up a player just finishing his entry-level contract for only a second round draft pick. *Id.* In doing so, the offering team eliminates some of the uncertainty that comes with drafting players and gets a more

C. *Has the Salary Cap Really Solved the Inflationary Effect that Salary Arbitration Had on Player Salaries and the Problems that Derived From those Salaries?*

Salary arbitration under the old CBA has been characterized as one of the primary contributors to the league's downfall due to the inflationary impact it had on player salaries and the lack of restraint on the salary awarded.[116] Furthermore, because salaries were skyrocketing in large part due to salary arbitration, low-revenue teams were losing players because they could not afford to pay the arbitration award.[117]

Because the lack of an upper limit for player salaries opened the door for salary arbitration to award unrealistically high salaries—thereby slanting the competitive field in favor of larger market teams—one would assume that the implementation of a cap on player salaries would shift the competitive field to a more neutral ground.[118] However, the predicted effect, curbing player salaries so that teams of all market sizes could compete for star players, may not be coming to fruition.[119] The salary cap's shortcomings thus far have been twofold: high-revenue teams are still at a competitive advantage because they are more capable of spending money to the upper limit of the salary cap,[120] and low-revenue teams are still failing financially

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experienced youngster. *Id.*

[116] Yoost, *supra* note 6, at 524. According to Yoost, the new salary cap system would curtail the inflationary tendencies of salary arbitration because there would be an upper limit that no salary would be allowed to surpass. *Id.*

[117] Aubut, *supra* note 5, at 237. The result was that the competitive playing field was not level between high and low revenue teams. *Id.* The larger the market in which the team operated, the more star players the team could afford to add in free agency. *Id.*

[118] Mike Loftus, *NHL Update; Little Movement in Negotiations; Owners, Players Still Heading Toward Lockout*, THE PATRIOT LEDGER (Quincy, Mass.), Sept. 4, 2004, at 47. Loftus argued that the lack of a salary cap was the main failure of the previous CBA and one of the causes of the 2004 season-long lockout. *Id.* Loftus pointed to the fact that from 1994 to 2004, average player salaries increased from \$560,000 to \$1.8 million. *Id.*

[119] El-Bashir, *supra* note 71. Three years after the addition of the salary cap system to the NHL, a move that league insiders believed would help level the competitive playing field between high- and low-revenue teams, those same insiders were voicing concerns that the disparity was growing once again. *Id.*

[120] *Id.* Carolina Hurricanes General Manager Jim Rutherford predicted that "[w]ith the cap going higher, each team is going to have their own internal budget, and the bigger-revenue teams will have a better chance, on a regular basis, of making the playoffs than the teams that can't afford to spend." *Id.* El-Bashir was concerned that the same inflationary effects that salary arbitration had on salaries in the pre-salary cap era were arising within the confines of the salary cap system. See *Id.* El-Bashir's concerns were manifested in the spending spree undertaken during the 2007 off-season by the New York

because they are forced to spend above the cap floor.[121]

V. CONCLUSION

A. *The Future of Salary Arbitration in the Salary Cap Era*

In 2006, a year after the NHL began to operate under the CBA, Yoost predicted that salary arbitration would become obsolete because a ceiling was now in place to prevent salaries from indefinitely spiraling upward.[122] He argued that during each off-season teams, would focus their negotiations on preserving cap space, not on keeping their players at any price

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Rangers and Philadelphia Flyers, two of the highest-revenue teams in the league and teams whose pre-salary cap spending precipitated the need for change. *Id.* During the 2007 off-season free agency period, New York signed the two most sought-after players in the free agency pool, centers Scott Gomez and Chris Drury, while Philadelphia signed the next best forward, center Daniel Briere. El-Bashir, *supra* note 72. The two teams committed almost $140 million to those three players alone. *Id.* Meanwhile, that same off-season, the Nashville Predators, who the previous season had challenged for the best regular season record in the league, were operating under one of the lowest payrolls in the league and as a result could not attract the big name free agents needed to push their team over the top. *Id.* As Howard Bloom of Sports Business News in Ottawa pointed out, "[t]he bottom line is that the economic disparity that existed in the NHL before the lockout still exists, and it has everything to do with how hockey is perceived in the individual markets." *Id.* It is typical for the high-revenue teams such as New York to operate with a budget right up against the cap. Jeff Z. Klein, *By Trading Gomez, Rangers Can Shop*, N.Y. TIMES, July 1, 2009, at B16. In the summer of 2009, the New York Rangers traded Scott Gomez, whom they had signed to a cap heavy deal only two years earlier and who was underperforming on the ice, in order to clear enough cap space to pursue a top-level free agent. *Id.* Rangers General Manager Glen Sather said that he made the move in order to move the team away from the upper limit of the salary cap so that the Rangers could add a star forward in free agency, which would put the team right up against the cap again. *Id.*

121 *Calgary Herald Examines NHL Salary Cap, CBA, Expansion Efforts*, SPORTS BUSINESS DAILY, Apr. 15, 2009, *available at* http://www.sportsbusinessdaily.com/article/129375. Teams such as the Nashville Predators, Phoenix Coyotes, and Atlanta Thrashers were seen as failing before the lockout in 2004–2005 and are still considered to be failing in the salary cap era. *Id.* The reason these teams are still struggling financially is that they are forced to spend beyond their internal budgets in order to exceed the new CBA-mandated salary cap floor. *Id.* NHLPA Executive Committee member and Calgary Flames defenseman Robyn Regehr said of the new CBA, [NHL Commissioner] Gary Bettman sold it to the fans as: "The ticket prices of the teams were going to come down, we're going to be able to have a level playing field for every single team in the league . . . you can see that there's still teams that are in trouble. The cap, really, I don't think has done the things Gary said it would." *Id.*

122 Yoost, *supra* note 6, at 532.

necessary.[123] Therefore, according to Yoost, the number of players resorting to salary arbitration will eventually decline to the point where the league and players decide to do away with the process.[124] The role of salary arbitration may lessen; however, the process will remain a viable feature of NHL salary negotiations in the future.

Yoost may have been correct in his assertion that less players would look to salary arbitration as a means of boosting their salaries; however, the number of filings since 2006 shows that the process's use has not gradually diminished as Yoost predicted. In 2004, the year before the lockout, sixty-seven players filed for salary arbitration.[125] In 2007, three years after the implementation of the new CBA, thirty players filed for salary arbitration.[126] In 2008, sixteen players filed,[127] while in 2009, five years after the salary cap was introduced, twenty players filed for arbitration.[128]

These numbers show that although player participation has gone down since the salary cap was implemented, it has not gone down year after year and it is still being used by players five years after the new CBA was negotiated. Furthermore, Yoost's prediction that salary arbitration will be phased out because players will not be able to use it as a negotiating tool due to the fact that teams will look to manage their cap in June and July, before the arbitration process begins, is likely misplaced. In fact, salary arbitration will remain an effective form of leverage for the players.[129] If a player is valued by his team and he threatens to file for arbitration, the team may decide to give in to his contract demands rather than risk the possibility that an arbitrator will award a salary that does not fit the team's budget under the salary cap.

Along these lines, salary arbitration may still have some inflationary

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[123] *Id.* Yoost asserted that because the off-season begins in June and arbitration does not occur until the first two weeks of August, players will have little incentive to use arbitration as a way to boost their salaries because most cap space will be dedicated to contract negotiations in June and July. *Id.*

[124] *Id.* The NHL's current CBA is scheduled to expire following the upcoming 2010–2011 season, at which point the league and the players will have to renegotiate. Collective Bargaining Agreement FAQs, *supra* note 63.

[125] Jamie Fitzpatrick, *2004 NHL Salary Arbitration Awards*, Aug. 24, 2004, http://proicehockey.about.com/od/nhlfreeagents/a/04_arbitration.htm.

[126] Sports City, 2007 Salary Arbitration Cases, http://www.sportscity.com/NHL/Salary-Arbitration (last visited Oct. 30, 2011).

[127] CBS Sports.com, 2008 Salary Arbitration Filings, June 27, 2008, http://www.cbssports.com/nhl/_story/10879613.

[128] TSN.ca, *20 NHL Players Elect to Take Their Teams to Salary Arbitration*, July 5, 2009, http://www.tsn.ca/nhl/story/?id=283832.

[129] *See* Rossi, *supra* note 106.

effects among player salaries, although not on as large a scale as the pre-salary cap system. Because a player's salary arbitration award is public to players and agents around the league, if a player is awarded a high salary, other players in that player's skill bracket will use the figure to renegotiate their contracts.

B. *Broader Implications of the Salary Cap*

In 2009, NHL Commissioner Gary Bettman said of the salary cap system, "[t]he relationship between revenues and player salaries gives the business of the league the stability that it needs. . . . What we have seen from this stability is perhaps the best competitive balance that the league or any league has ever seen."[130] What the commissioner failed to recognize, however, is that despite the fact that all teams in the league cannot spend above a specific level on player salaries, the high-revenue teams will always be able to spend to the upper limit of the cap. On the other hand, low-revenue teams in less traditional hockey markets will do everything in their power to spend as close to the cap floor as possible. Therefore, the high-revenue teams will still be able to offer more lucrative deals to star free agents, and as a result, these teams will be able to compete for championships on a far more regular basis than their low-revenue counterparts. Although the playing field has been leveled in theory, the teams with the deepest pockets still have an advantage.

[130] *Calgary Herald Examines NHL Salary Cap, CBA, Expansion Efforts*, *supra* note 121.